

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

SEP 25 2009

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,

Petitioner,

v.

HON. TERESA GODOY, Judge Pro  
Tempore of the Superior Court of the  
State of Arizona, in and for the County of  
Pima,

Respondent,

and

ALEJANDRO XAVIER GUTIERREZ,

Real Party in Interest.

2 CA-SA 2009-0052

DEPARTMENT A

DECISION ORDER

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR-20081827

JURISDICTION ACCEPTED; RELIEF GRANTED

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and

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¶1 In this special action, the State of Arizona challenges the respondent judge’s order precluding the admission of evidence related to Intoxilyzer 8000 breathtests conducted on real party in interest Alejandro Gutierrez when he is tried for driving with an alcohol concentration of .08 or more, driving with an alcohol concentration of .15 or more, and driving under the influence of alcohol while impaired to the slightest degree. We accept jurisdiction because the state does not have an equally plain, speedy, and adequate remedy by appeal. *See State v. Superior Court*, 195 Ariz. 555, ¶ 7, 991 P.2d 258, 260 (App. 1999).

¶2 Gutierrez moved the court to consider, on his behalf, motions filed in a consolidated case pending in another division that “sought production of the software configuration (‘source code’) of the Intoxilyzer 8000, the breath-testing equipment currently used by the Tucson Police Department.” *State v. Bernini*, 220 Ariz. 536, ¶ 1, 207 P.3d 789, 790 (App. 2009). The respondent judge issued orders similar to those entered in *Bernini*, ordering the manufacturer of the equipment, CMI, to produce the source code pursuant to

Rule 15(g), Ariz. R. Crim. P., after finding “the source code is not within the State’s control.”

At a subsequent hearing, however, the respondent judge determined that, like Judge Bernini, she lacked authority to order CMI to produce documents in the case because CMI was neither a party to the proceedings nor a resident of this state. The respondent judge then expressed concern that Gutierrez had moved for sanctions if the source code was not disclosed, stating:

So the state doesn’t have [the source code]. I already found that they don’t have the ability to get it. CMI isn’t giving it over. So where does that leave us in terms of the sanctions that [Gutierrez] is moving for? He’s moving for sanctions in terms of dismissing the count that involves the Intoxilyzer.

Notwithstanding her previous findings, the respondent then ordered the Tucson Police Department to obtain and disclose the source code adding,

If that can’t be done, I’m going to order that any evidence that an Intoxilyzer was given and the result be precluded based on the due process violation and the inability of Mr. Gutierrez to make any meaningful investigation or challenge into the huge piece of evidence that’s being brought against him.

¶3 In *Bernini*, we held the respondent judge in that case had

erred as a matter of law and abused her discretion in ordering the state to produce source code material for the Intoxilyzer 8000 that it did not possess and had been unable to obtain, without any evidence the state had “better access” than defendants to what CMI maintains are trade secrets.

220 Ariz. 536, ¶ 11, 207 P.3d at 792. After that decision was filed, the state moved for reconsideration of the respondent judge’s order that the Tucson Police Department be required to produce the source code, and the respondent granted that motion.

¶4 The respondent judge here granted the state’s motion for reconsideration but, in the same order, appears to also have granted Gutierrez’s motion for sanctions by precluding evidence that Gutierrez had submitted to a breath test and any test results on the ground that “he has no meaningful way to challenge the breath test.” We agree with the state that the respondent judge abused her discretion. After finding, on reconsideration, that the Tucson Police Department could not be required to produce the source code pursuant to Rule 15.1(g), the respondent judge was without a basis to impose a sanction under Rule 15.7(a)(1). Any other basis for precluding the evidence is, at this stage of the proceedings, premature at best. As the state notes, the respondent judge has never held an evidentiary hearing on the issue of admissibility of this evidence. *See Superior Court*, 195 Ariz. 555, ¶ 7, 991 P.2d at 261 (“[a]t a minimum, the State should have been allowed to offer evidence to test its theory of admissibility” of breath test results).

¶5 Accordingly, having found the respondent judge abused her discretion, we grant relief, *see* Rule 3(c), Ariz. R. P. Spec. Actions, and vacate the respondent’s order precluding the admission of evidence of breath tests administered to Gutierrez and their results.

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JOSEPH W. HOWARD, Chief Judge

Presiding Judge Espinosa and Judge Brammer concurring.